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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

314-677

No. 670

WILLIAM C. KRUEGER, HUGH C. BARRETT AND INGLIS M. UPPERCU, AS SURVIVING TRUSTEES IN LIQUIDATION OF UNITED STATES BREWING COMPANY,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ARTHUR T. VANDERBILT,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 670

WILLIAM C. KRUEGER, HUGH C. BARRETT AND INGLIS M. UPPERCU, AS SURVIVING TRUSTEES IN LIQUIDATION OF UNITED STATES BREWING COMPANY,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI.

May it please the Court:

The petition of William C. Krueger, Hugh C. Barrett and Inglis M. Uppercu, as Surviving Trustees in Liquidation of United States Brewing Company, respectfully shows to this Honorable Court:

A.

Summary and Short Statement of the Matter Involved.

Two principal questions are involved in the present case: (1) the right of the petitioners to recover certain income and profits taxes on the ground that the assessment of such taxes was barred by lapse of time, where certain Waivers

or Consents, purporting to extend the time for assessment, were signed by only one of the three surviving trustees in liquidation of the taxpayer-company without authority from his co-trustees and where the applicable law of New Jersey requires that trustees in liquidation of a dissolved company act by a majority; and (2) whether an amendment to a claim for refund, which amendment was based on the Government's failure to allow proper losses caused by the enactment of prohibition legislation, was timely filed though filed after the period for filing claims since it was related to a prior timely claim the consideration of which led the Government into the field covered by the amendment. Since the refund claimed in the second question involves a portion of the same taxes claimed under the first question, a decision in favor of the petitioners on the first issue would eliminate the necessity of deciding the second question. These questions are raised by Counts 1 and 2, respectively, of petitioners' complaint below, and respondent's amended answer thereto (R. 3-20).

The United States Brewing Company was incorporated under the laws of New Jersey (R. 21). On July 10, 1922, the corporation was voluntarily dissolved pursuant to Section 31 of the Corporation Act of the State of New Jersey (P. L. 1896, Ch. 185, p. 287, sec. 31, now R. S. 14·13-1) (R. 22). (The text of R. S. 14:13-1 is annexed to the brief accompanying this petition and is printed as Appendix A thereto.)

At the time of dissolution the directors of the corporation were Gottfried Krueger, William C. Krueger, Peter Hauck, Jr., Hugh C. Barrett, and Inglis M. Uppercu (R. 22). By virtue of the Corporation Act of New Jersey, R. S. 14:13-5, R. S. 14:14-8, these directors became the statutory liquidating trustees with sole power to wind up the corporate affairs, and in whom title to the corporate property vested. (The text of R. S. 14:13-5 and R. S. 14:14-8 is annexed to

the brief accompanying this petition and is printed as Appendix B and C, respectively, thereto.) Peter Hauck, Jr. died on September 8, 1922, and Gottfried Krueger died on November 6, 1926, leaving the present petitioners as the surviving liquidating trustees (R. 23).

On December 12, 1923, Hugo Boepple, Jr., who had been Assistant Secretary of the corporation, informed the Commissioner of Internal Revenue of the dissolution, and requested that an examination of the corporation's books for the years 1918 and 1919, in which the Commissioner was then engaged, be extended to include the following years (R. 24, 149).

After examination, the commissioner notified the corporation of a proposed jeopardy assessment for the calendar year 1918 in the amount of $426,209.28, and a tax deficiency in that amount was assessed on the March 1924 list of assessments for 1918 (R. 24-26).

On April 7, 1924, a claim for abatement was filed with the Collector of Internal Revenue for the Fifth District of New Jersey, and conferences were arranged (R. 26, 166).

The liquidating trustees, by a resolution of November 7, 1924 authorized one William F. Hoffmann to act for them as attorney in fact, and to settle the tax claims. A copy of this resolution was filed with the government on the same date (R. 389-390, 405, 410, 445, 172-173, 26).

After the first conference in Washington on November 10, 1924, Mr. Hoffmann attended from twenty-five to thirty conferences with government officials in order to dispose of the tax claims as quickly as possibl (R. 390-391).

At the first conference, Mr. Hoffmann was accompanied by William C. Krueger, and Mr. Snelham, an accountant. This was the only conference with government representatives that William C. Krueger ever attended (R. 444-445). Following the first conference, the taxpayer was allowed additional time within which to submit data supporting its

claim conditional upon the furnishing of waivers of the statutory periods of limitation for assessment of any deficiencies ultimately determined to be due (R. 175).

On November 11, 1924, Mr. Snelham prepared a form of Waiver, and a form of Power of Attorney appointing his associate, Edward M. Treanor, attorney in fact to act for the Trustees and mailed the forms to William C. Krueger (R. 184, 185).

On November 12, 1924 Hugo Boepple, Jr., who was not a Trustee in liquidation, but who, as was previously stated, was assistant secretary of the company before dissolution, received these documents, took them to William C. Krueger, had him sign them, attested his signature, attached the seal, and mailed them to the Government the same day (R. 424-425).

The other Trustees had no knowledge of these documents, and never authorized William C. Krueger to sign a waiver, nor did they authorize Mr. Krueger or any person other than Mr. Hoffmann to act for them (R. 405, 410-411, 428-430). Mr. Hoffman, moreover, the authorized representative of the trustees, had no knowledge of the documents and did not authorize Mr. Krueger to execute them (R. 391-392, 424-426).

Although the Waiver and the Power of Attorney were signed by William C. Krueger at the same time, the Government, after receipt of the documents and after inquiring into Krueger's authority to act for the Trustees, kept the Waiver but returned the Power of Attorney on December 19, 1924 together with a letter in which the Government stated:

> "You are requested to have the power of attorney executed by the board of directors who under the laws of New Jersey are trustees in liquidation of the dissolved corporation" (R. 28, 200-201).

The Government, at the date of the above letter, necessarily had notice that a single liquidating trustee had no authority under the laws of New Jersey to act for the board of trustees of a dissolved corporation. On that date, five months remained for the fiscal year 1919 and eighteen months for the fiscal years 1920 and 1921 within which to assess any tax claimed due for those years. Nevertheless, the Government permitted the limitation of Section 277 (a) (2) and (a) (3) of the Revenue Act of 1926, 44 Stat. 58, to run without making a timely assessment. (The text of Section 277 (a) (2) and (a) (3) of the Revenue Act of 1926 is annexed to the brief accompanying this petition and is printed as Appendix D thereto.)

During the year 1925, data on obsolescence of the corporation's plant was submitted and considered. The problems were still under consideration in December, 1925, when it became necessary for the Government to secure further waivers (R. 28-29, 224).

Accordingly, on December 14, 1925, William C. Krueger signed four Waivers for the years 1918, 1919, 1920 and 1921 respectively (R. 29, 227-234). These waivers were signed by Mr. Krueger in the same manner and under the same circumstances as the first waiver: *i. e.*, Mr. Boepple received the documents in the mail, took them to Mr. Krueger, had him sign them, attested the signature, made an impression of the seal thereon, and mailed them to Washington the same day (R. 424-425).

Mr. Barrett and Mr. Uppercu, the other Trustees, had no knowledge of these Waivers, and never authorized William C. Krueger to sign them. Nor did they authorize Mr. Krueger or any person other than William F. Hoffmann to act for them. Mr. Hoffmann, moreover, had no knowledge of the Waivers and did not authorize Mr. Krueger to act. The receipt, execution and filing of these Waivers was at no time called to the attention of, or discussed

with, Mr. Hoffmann or the Trustees (R. 391-392, 405, 410-411, 424-426, 428-430, 445-446).

Following the aforementioned conferences, Mr. Hoffmann accepted a Government figure of approximately $129,000, though he had no information as to its accuracy (R. 391).

The company's payment of these income taxes on December 15, 1926 was in the sum of $136,366.55, covering the following (R. 30-31, 290):

Assessment for period Jan. 1, 1918 to March 31, 1918	$4,885.19
Deficiency fiscal year ended March 31, 1919	38,206.46
Deficiency fiscal year ended March 31, 1920	87,241.61
Deficiency fiscal year ended March 31, 1921	1,086.83
Interest	4,947.46
	$136,366.55

The first count of petitioners' complaint sought the recovery of the entire sum paid. On the oral argument, however, the petitioners withdrew their claim for $4,885.19, the amount paid under the assessment for the period January 1, 1918 to March 31, 1918 (R. 477).

The respondent, by its amended answer, has admitted that unless it can establish either the validity of the Waiver or sufficient facts to create an estoppel, the balance of taxes paid is fully recoverable under the First Count of petitioners' complaint (R. 13-15, 16-18).

The petitioners' claim under the Second Count of their complaint seeks the recovery of a portion of the same tax the recovery of which is sought under the First Count. Hence a judgment in favor of petitioners on the First Count would eliminate the necessity for a consideration of the Second Count.

In the Second Count, the petitioners alleged that the United States Brewing Company, prior to the effective date

of prohibition, was engaged in the manufacture of beers, ales, and porter, operating three plants known as the Krueger Brewery, the Trefz Brewery, and the Hauck Brewery; that prohibition destroyed its business, and forced the closing of its breweries early in 1920 and their sale subsequent thereto at a loss of $932,646.82. It was then alleged that the breweries were not thereafter opened or used by the company in any manner except that the Krueger and Hauck breweries were, prior to their sale, operated intermittently for a period of about two years in experimenting with the manufacture of near beer, and that the Government determined that the sole cause of the loss was due to prohibition legislation, but notwithstanding this determination, allowed but $533,442.49 of the loss and disallowed the remaining $399,204.33 because of the experiments with near beer (R. 8-13). In its amended answer the Government denied the petitioners' allegations and, in addition, as a separate defense, pleaded the statute of limitations (R. 15-16, 18-20).

The facts established at trial bearing on the Second Count were these:

The United States Brewing Company, prior to January 16, 1920, had built up a substantial and lucrative business in the manufacture and sale of beers, ales, and porter, and had invested large sums in plants and equipment for that purpose (R. 21).

In its tax returns for the fiscal years ended March 31, 1919, 1920 and 1921 the company claimed a loss for obsolesence of its properties caused by the enactment of prohibition legislation (R. 78-125).

On June 22, 1925, Herbert J. Ord, a government engineer, after examination of the United States Brewing Company properties, submitted a report to his superiors entitled "Report on Obsolescence" (R. 205). This report was accepted, approved, and acted upon by the Government in the

assessment letter of June 3, 1926, which formed the basis of the computation and determination of the tax assessed against the company in October, 1926 (R. 28, 237). In this report Mr. Ord found, and by its acceptance of the report, the Government determined, that on January 31, 1918, the net depreciated cost of the properties used by the United States Brewing Company in the manufacture of beer was $1,667,646.82 (R. 207). These properties were sold for cash for the sum of $735,000, resulting in a loss of $932,646.82 (R. 15, 24).

Mr. Ord in his Report found, and by its acceptance of that report the Government determined, that prohibition legislation was the sole cause of this loss (R. 217).

Despite this determination, the Government allowed but $533,442.49 of the $932,646.82 loss and disallowed the remainder of $399,204.33 (R. 29). The reason for the disallowance was the intermittent operation of the Krueger and Hauck Breweries in experimenting with near beer. As Mr. Ord stated:

> "The Krueger and Hauck Breweries were shut down for a time in 1920. They were then operated intermittently until April, 1922, in experimenting with the manufacture of 'near beer' or so called 'cereal beverages' " (R. 206).

On February 6, 1930, the Company made its claims for refund in the amounts of $38,206.46, $87,241.61 and $1,085.83 for the fiscal years March 31, 1919, 1920 and 1921 respectively, on the ground that the assessment and collection of the taxes paid were made beyond the statutory period of limitation (R. 31-32).

The consideration of these claims for refund by the Government, and the discussions had concerning its defenses thereto, including a defense that the petitioners were estopped to deny the validity of the Waivers, led to the filing by the petitioners of a Brief, dated August 25, 1931, with the

Commissioner of Internal Revenue. In this Brief the petitioners, in seeking to rebut the defense of estoppel, stated:

> "It is to be noted that in this case no such defense can exist, in that the Commissioner of Internal Revenue knew at the time and before the time these documents were requested that the individual liquidating trustee, William C. Kruger, had no authority to bind the Corporation. The failure of the taxpayer to procure representation of Tax Counsel was a serious detriment to the proper disposition of its case. This is readily evident, if one were to consider the merits of the case itself, which are as follows:
>
> "The taxpayer filed a claim for Obsolescence predicated upon the National Prohibition Act. In an Obsolescence report prepared by one, Herbert J. Ord, an Engineer employed by the Bureau of Internal Revenue, it was found that the undepreciated costs of the taxpayer's property, upon which obsolescence was properly allowable aggregated $2,440,136.11. The depreciated costs thereof to January 31, 1918 were $1,667,646.82. The total obsolescence allowed therefor was $533,442.49, notwithstanding the fact that the Taxpayer actually sold to wholly disinterested parties the entire plant and property for a total consideration of $735,000.00, which deducted from the depreciated cost of $1,667,646.82 resulted in a loss to the Taxpayer of $932,646.82, that was directly attributable to the passage of the National Prohibition Act. It is further to be noted that the aforesaid plant and property was sold in 1922 and that during the interim from 1919 to 1922 a small portion of the plant was devoted to an attempt to manufacture a small quantity of near beer, so as to maintain such revenue as could possibly be derived for the purpose of paying local and state taxes. It must be conceded that if the Taxpayer had the benefit of the experience and knowledge of any competent Tax Counsel or Auditor, that the aforesaid facts could have been properly presented to the Bureau of Internal Revenue and a loss allowed in full rather than only in

part, to the extent of approximately one half of the actual amount. It is further to be noted that the report of Herbert J. Ord, the Engineer states that he found as a fact that the Corporation did not institute the manufacture of near beer, but instead took definite steps in 1920 to go out of business and further, said Engineer's report specifically states as his final conclusion to said report that he is fully satisfied that National Prohibition was and is the sole cause of the losses to the Taxpayer Corporation" (R. 340-341).

On August 11, 1932, the petitioners filed formal amendments to their claims for refund for the fiscal years ended March 31, 1919, 1920 and 1921 in the respective amounts of $38,206.48, $100,000, and $1,085.83 in which they claimed they were entitled to deduct the entire loss caused by the enactment of prohibition legislation without regard to the experiments with near beer (R. 32, 350-355).

The principal defense of the respondent to the Second Count of the complaint was that the amended claims for refund were barred by the statute of limitations, Section 284 (b) (1) of the Revenue Act of 1926, 44 Stat. 66, in that they were not sufficiently related to the grounds presented in the prior timely claims. (The text of Section 284 of the Revenue Act of 1926 is annexed to the brief accompanying this petition and is printed as Appendix E thereto.)

The District Court found for the petitioners, plaintiffs below, on the First Count and ordered the entry of judgment in the amount of $126,533.90 with interest (R. 500-502). No judgment was rendered on the Second Count. The court's findings of fact were substantially to the same effect as the facts herein outlined (R. 482-494). In particular, the court found that the liquidating trustees authorized William F. Hoffmann to act for them as attorney in fact in attending conferences relating to the tax matters; that Mr. Hoffmann attended at least twenty-five or thirty conferences with Government officials, only one of which, the first conference, was

attended by William C. Krueger; that the liquidating trustees other than William C. Krueger never authorized the latter to sign the waivers, never authorized anyone other than Mr. Hoffmann to act for them, and that Mr. Hoffmann and the trustees had no knowledge whatsoever of the waivers or the power of attorney appointing Mr. Treanor; that although the first waiver and the power of attorney were both signed by William C. Krueger at the same time, the Government, after inquiring into Mr. Krueger's authority to act, kept the waiver and returned the power of attorney with an accompanying letter in which the Government concluded that Mr. Krueger had no authority, under New Jersey law, to act with reference to the power of attorney; and, that the Government, after it had knowledge of the limitations on Mr. Krueger's powers, still had five months for the fiscal year 1919, and eighteen months for the fiscal years 1920 and 1921 within which to assess any tax it claimed to be due, and despite that knowledge, permitted the statute of limitations to run without making a timely assessment. The court therefore found, in its Conclusions of Law, that under the Corporation Act of New Jersey, the liquidating trustees must act by at least a majority, and a single trustee cannot, by his individual act, bind the trustees or the property of the dissolved corporation; that the laws of New Jersey control the question as to who is empowered to act for a New Jersey corporation in dissolution; that the assessments for 1919, 1920 and 1921, having been made after the bar of the statute of limitations had fallen, were unlawful and illegal; and that the petitioners were not estopped from claiming a refund of the tax (R. 495).

The opinion of the District Court is reported in *Krueger* v. *United States*, 33 F. Supp. 102, and in the Record at page 496.

The Circuit Court of Appeals for the Third Circuit rendered judgment of reversal on June 30, 1941, appar-

ently on the ground that one liquidating trustee had power to waive the statute of limitations, but that, in any event, Mr. Krueger possessed at least implied authority from his co-trustees to waive the limitation on assessments (R. 521).

The Circuit Court of Appeals felt that the Second Count was "not pressed with any great zeal" and disposed of that Count by finding that there was no relation between the amendment and the original claim for refund. The opinion of the Circuit Court of Appeals was unreported officially at the time of the filing of this petition. It will be found in the Record at page 514.

B.

Reasons Relied on for the Allowance of the Writ.

1. The Circuit Court of Appeals for the Third Circuit in holding that less than a majority of the liquidating trustees of a dissolved New Jersey corporation had power to bind the dissolved corporation to a waiver of the statutes limiting the time within which federal income and profits taxes may be assessed, has decided an important question of local law in a way which conflicts with the applicable statutes and decisions of New Jersey. The matter is of importance aside from the large sums of money involved. In failing to follow the State law, the Circuit Court of Appeals has, in effect, refused to follow the decision of this Court in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, where it was held that neither Congress nor the Federal Courts can constitutionally declare the substantive rules of law applicable in a state. More specifically, the decision of the Circuit Court of Appeals is in conflict with the decisions of this Court in *Oklahoma Natural Gas Co.* v. *Oklahoma,* 273 U. S. 257 and *Glenn* v. *Liggett,* 135 U. S. 533 where it was held that the powers of a corporation in dissolution and the rights of the parties in a suit by a dis-

solved corporation to enforce unpaid subscriptions to stock are governed by the law of the state of incorporation.

2. The Circuit Court of Appeals for the Third Circuit, in holding that William J. Krueger, one of the liquidating trustees of the dissolved corporation here involved, possessed implied authority from his co-trustees to waive the statute of limitations with regard to assessment of the federal income and profits tax, nullified the findings of fact of the District Court for the District of New Jersey, thereby ignoring or misconstruing Section 52 (a) of the Rules of Civil Procedure, and in effect deciding a question of law in conflict with the decisions of the Circuit Courts of Appeals for the Seventh, Ninth and Tenth Circuits. *Santa Cruz Oil Corp.* v. *Allbright-Nell Co.*, 115 F. (2d) 604 (C. C. A. 7th); *Webb* v. *Frisch*, 111 F. (2d) 887 (C. C. A. 7th); *Continental Oil Co.* v. *Jones*, 113 F. (2d) 557 (C. C. A. 10th); *Kelly* v. *Aderhold*, 112 F. (2d) 118 (C. C. A. 10th); *Wittmayer* v. *United States*, 118 F. (2d) 808 (C. C. A. 9th). (The text of Section 52 (a) of the Rules of Civil Procedure is annexed to the brief accompanying this petition and is printed as Appendix F thereto.)

3. The Circuit Court of Appeals for the Third Circuit, in denying, on the ground that the claim was untimely, the right of the petitioners to a reduction of their assessment in accordance with an amendment to their claim for refund, which amendment was filed after the period for filing claims, but which involved claims concerning which the Government was put on notice by virtue of its consideration of the original claim and briefs filed in support thereof, has decided a federal question in a way probably in conflict with the decisions of this Court in *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62; *United States* v. *Factors & Finance Co.*, 288 U. S. 89; *Bemis Bros. Bag Co.* v. *United States*, 289 U. S. 28.

4. The Circuit Court of Appeals for the Third Circuit, in denying on the ground that the claim was untimely, the right of the petitioners to a reduction of their assessment in accordance with an amendment to their claim for refund, which amendment was filed after the period for filing claims, but which involved claims concerning which the Government had notice by virtue of its consideration of the original claim and briefs filed in support thereof, has rendered a decision in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Pink* v. *United States,* 105 F. (2d) 183, and in conflict with the decisions of the Court of Claims in *Youngstown Sheet & Tube Co.* v. *United States,* 7 F. Supp. 290, *cert. den.* 293 U. S. 599 and in *Con. P. Curran Printing Co.* v. *United States,* 15 F. Supp. 153, *cert. den.* 301 U. S. 686, on the same matter.

5. The Circuit Court of Appeals for the Third Circuit, in denying, on the ground that the claim was untimely, the right of the petitioners to a reduction of their assessment in accordance with an amendment to their claim for refund, which amendment was filed after the period for filing claims, but which involved claims concerning which the Government had notice by virtue of its consideration of the original claim and briefs filed in support thereof, has decided an important question of Federal law which has not been, but should be, settled by this Court. See *United States* v. *Andrews,* 302 U. S. 517, 527.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Third Circuit, commanding that court to certify to and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its Docket No. 7508, *United States*

of America, Appellant, v. *William C. Krueger, Hugh C. Barrett and Inglis M. Uppercu, as surviving trustees in liquidation of United States Brewing Company, Appellees,* and that the said judgment of the Circuit Court of Appeals of the Third Circuit may be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

ARTHUR T. VANDERBILT,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 670

WILLIAM C. KRUEGER, HUGH C. BARRETT AND INGLIS M. UPPERCU, AS SURVIVING TRUSTEES IN LIQUIDATION OF UNITED STATES BREWING COMPANY,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The opinion of the District Court of the United States for the District of New Jersey (Fake, U. S. D. J.) was filed on April 29, 1940. It is printed in the Record at page 496, and is reported in 33 Fed. Supp. at page 102.

The opinion of the United States Circuit Court of Appeals for the Third Circuit (Clark, C. J.) has not been officially reported at the time of the filing of this brief, but said opinion was rendered June 30, 1941 and is found in the Record at page 514.

II.

Jurisdiction.

1. The date of the judgment of the Circuit Court of Appeals for the Third Circuit to be reviewed was June 30, 1941 (R. 521).

2. This petition was filed within three months of June 30, 1941.

3. The jurisdiction of the Court to issue the writ of certiorari herein prayed for is invoked under Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938 (U. S. C. A., Title 28, Section 347).

4. Petitions for writs of certiorari in similar cases have heretofore been granted by this Court in *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62; *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73; *United States* v. *Factors & Finance Co.*, 288 U. S. 89; *Bemis Bros. Bag Co.* v. *United States*, 289 U. S. 28; *United States* v. *Andrews*, 302 U. S. 517; and *United States* v. *Garbutt Oil Co.*, 302 U. S. 528.

III.

Statement of the Case.

A full statement of the case has heretofore been given under heading A in the petition, and in the interests of brevity the statement will not be repeated in the brief.

IV.

Specification of Errors.

1. The Circuit Court of Appeals for the Third Circuit erred in holding that less than a majority of the liquidating trustees of a dissolved New Jersey corporation had power to bind the dissolved corporation to a waiver of the stat-

utes limiting the time within which Federal income and profits taxes may be assessed.

2. The Circuit Court of Appeals for the Third Circuit erred in ignoring and refusing to follow the findings of fact of the United States District Court for the District of New Jersey to the effect that William C. Krueger, one of the liquidating trustees of the dissolved corporation here involved, was not authorized by his co-trustees to waive the statute of limitations with regard to assessment of the Federal income and profits tax, and that such co-trustees had no knowledge of the said waivers.

3. The Circuit Court of Appeals for the Third Circuit erred in denying the right of the petitioners to a reduction of their assessment in accordance with an amendment to their claim for refund, which amendment was filed after the period for filing claims, but which involved claims concerning which the Government was put on notice by virtue of its consideration of the original claim and briefs filed in support thereof.

4. The Circuit Court of Appeals for the Third Circuit erred in holding that an amendment to a claim for refund, which amendment was filed after the period for filing claims, but which involved claims concerning which the Government was put on notice by virtue of its consideration of the original claim and briefs filed in support thereof, was untimely and that relief with reference to the matters set forth in said amendment was barred by the statute of limitations.

V.

ARGUMENT.

Summary of the Argument.

Point A. The holding of the Circuit Court of Appeals for the Third Circuit to the effect that less than a majority of

the liquidating trustees of a dissolved New Jersey corporation had power to bind the dissolved corporation to a waiver of the statutes limiting the time within which Federal income and profits taxes may be assessed conflicts with the controlling statutes and applicable decisions of the State of New Jersey.

Point B. The holding of the Circuit Court of Appeals for the Third Circuit to the effect that William C. Krueger, one of the liquidating trustees of the dissolved corporation here involved, possessed implied authority from his co-trustees to waive the statute of limitations with regard to assessment of the Federal income and profits tax disregarded and nullified the findings of fact of the District Court for the District of New Jersey, in conflict with the proper interpretation of Section 52 (a) of the Rules of Civil Procedure and with the decisions of other Circuit Courts of Appeals.

Point C. The denial by the Circuit Court of Appeals for the Third Circuit, on the ground that the claim was untimely, of the right of the petitioners to a reduction of their assessment in accordance with an amendment to their claim for refund, which amendment was filed after the period for filing claims, but which involved claims concerning which the Government was put on notice by virtue of its consideration of the original claim and briefs filed in support thereof, has decided a Federal question in a way probably in conflict with the decisions of this Court.

Point D. The denial by the Circuit Court of Appeals for the Third Circuit, on the ground that the claim was untimely, of the right of the petitioners to a reduction of their assessment in accordance with an amendment to their claim for refund, which amendment was filed after the period for filing claims but which involved claims concern-

ing which the Government was put on notice by virtue of its consideration of the original claim and briefs filed in support thereof, has rendered a decision in conflict with a decision of the Circuit Court of Appeals for the Second Circuit and with decisions of the Court of Claims.

Point E. The denial by the Circuit Court of Appeals for the Third Circuit, on the ground that the claim was untimely, of the right of petitioners to a reduction of their assessment in accordance with an amendment to their claim for refund, which amendment was filed after the period for filing claims, but which involved claims concerning which the Government had notice by virtue of its consideration of the original claim and briefs filed in support thereof, has decided an important question of Federal law which has not been, but should be, settled by this Court.

Point A.

The holding of the Circuit Court of Appeals for the Third Circuit to the effect that less than a majority of the liquidating trustees of a dissolved New Jersey corporation had power to bind the dissolved corporation to a waiver of the statutes limiting the time within which Federal income and profits taxes may be assessed conflicts with the controlling statutes and applicable decisions of the State of New Jersey.

Under Section 277 (a) (2) and 277 (a) (3) of the Revenue Act of 1926, 44 Stat. 58, the Government is allowed four years after the filing of the return within which to assess income, excess-profits, and war profits taxes imposed by the Revenue Act of 1921 and by such Act as amended, and five years after the filing of the return within which to assess such taxes imposed by the Revenue Act of 1918 and by such Act as amended. (See Appendix D for text of Section 277 (a) (2) and (a) (3).)

By reason of this statute, the taxes, the return of which are sought in the present suit were, concededly, untimely assessed and therefore illegal unless the Government is able to show valid Waivers of the limitation imposed.

Uncontradicted evidence adduced before the District Court showed that the United States Brewing Company, a New Jersey corporation, had voluntarily dissolved on July 10, 1922 pursuant to Section 31 of the Corporation Act of the State of New Jersey, R. S. 14:13-1, and that its affairs then came under the direction of five liquidating trustees, and later, by reason of the death of two of the trustees, under the direction of the remaining three. (See Appendix A for text of R. S. 14:13-1.) The undisputed evidence further showed that five Waivers were signed by William C. Krueger, one of the liquidating trustees, and that this action of Mr. Krueger was without the knowledge of, and without authority from, his co-trustees, or the authorized agent of the trustees, Mr. Hoffmann.

The powers of a corporation in dissolution and the existence or extent of the authority of a given individual to act for such corporation are governed by the statutes and decisions of the State of incorporation, in this case, New Jersey. It is incumbent upon the Federal courts to follow the law of the appropriate State. These principles have been consistently followed in controversies involving the validity of tax waivers where, as here, there was no Federal statute governing the validity of such waivers. *Commissioner of Internal Revenue* v. *Godfrey*, 50 F. (2d) 79 (C. C. A. 2d), *cert. den.*, 284 U. S. 653; *Jaffee* v. *Commissioner of Internal Revenue*, 45 F. (2d) 679 (C. C. A. 2d), *cert. den.*, 283 U. S. 853; *A. J. Bates Co.* v. *United States*, 3 Fed. Supp. 245 (Ct. of Claims); *Southwestern Investment Co.*, 19 B. T. A. 30; *White Eagle Oil & Refining Co.*, 19 B. T. A. 195; *appeal dismissed, Burnett* v. *White Eagle Oil & Refining Co.*, 58 F. (2d) 141; *Farmers & Planters Tobacco Warehouse Co.*, 22 B. T. A. 1331; *T. W. Warner Co.*, 19 B. T. A. 872; *Bam-*

berg Cotton Co., 8 B. T. A. 1236; *Barron-Anderson Co.*, 17 B. T. A. 686.

Moreover, this Court has specifically held, in *Oklahoma Natural Gas Co.* v. *Oklahoma*, 273 U. S. 257, that the powers and duties of a corporation in dissolution are controlled by the law of the State of incorporation. Further, in *Glenn* v. *Liggett*, 135 U. S. 533, this Court has held that the rights of the parties in a suit by a dissolved corporation to enforce unpaid subscriptions to stock are governed by the law of the State of incorporation.

As will be shown subsequently, the validity of acts done in behalf of a dissolved New Jersey corporation is determined by statutory enactment, and by judicial construction of the statute. Even before *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, it was axiomatic that rules established by State statutes and the construction thereof given by the State court were matters of local law, and must be applied by the Federal courts under the Rules of Decision Act, R. S. Sec. 721, Act of September 24, 1789, c. 20, sec. 34, 1 Stat. 92. *Swift* v. *Tyson*, 16 Pet. 1, 18, overruled in the *Erie* case; and *Jones* v. *Prairie Oil & Gas Co.*, 273 U. S. 195. Under *Erie R. Co.* v. *Tompkins* the principle obtains *a fortiorari*. (The text of R. S. Sec. 721 is annexed to the brief accompanying this petition and is printed as Appendix G thereto.)

Since, therefore, the validity of the tax waivers at issue is a matter to be determined by the law of New Jersey, it becomes appropriate to examine the law of that State.

Section 31 of the Corporation Act of New Jersey, R. S. 14:13-1, after outlining the procedure in obtaining dissolution, provides:

> "Upon the issuance of such dissolution certificate by the secretary of state the corporation shall thereupon be dissolved, except as hereinafter provided, and the board of directors shall proceed to settle up and adjust its business and affairs, * * *"
>
> (See Appendix A for full text of R. S. 14:13-1.)

Section 54 of the same Act, R. S. 14:13-5, then provides, in part:

> "Upon the dissolution in any manner of any corporation, the directors shall be trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell and convey the property and divide the moneys and other property among the stockholders, after paying its debts, as far as such moneys and property shall enable them."
>
> (See Appendix B for full text of R. S. 14:13-5.)

Finally, Section 73 of the same Act, R. S. 14:14-8, provides:

> "Everything required by this title to be done by receivers or trustees shall be good and effectual, to all intents and purposes, if performed by a majority."
>
> (Text of R. S. 14:14-8 also printed as Appendix C.)

These provisions are so explicit in requiring the trustees to act by a majority that on one occasion only have the courts of New Jersey been called upon to decide a controversy involving the necessity of majority action by the trustees of a dissolved corporation. In *In re Delaware, etc. R. R. Co.*, 76 N. J. L. 163 (Sup. Ct.), the General Construction Company, a New Jersey corporation whose charter was forfeited, owned 112,314 shares of the stock of the Delaware River and Atlantic R. R. Co. of New Jersey. Three of its five directors, who had become its trustees under Section 54 of the General Corporation Act, executed a proxy appointing one Thompson to vote the stock owned by the dissolved corporation at an election of the Railroad Company. Subsequently, one of the trustees who had executed the proxy, revoked his assent to the proxy. Nevertheless, the shares were voted by Thompson at the election. As one of its reasons for setting aside the election, the Supreme Court held that the revocation destroyed the efficacy of the prox-

ies, "because they then became the act of only two of the directors, out of five, being less than a majority" (at p. 169).

It is well settled that the Supreme Court of New Jersey, although it is not the highest tribunal of that State, is of sufficient importance to require that its decisions be followed by the Federal courts, in the absence of contrary rulings by the highest State court. *Erie R. Co.* v. *Hilt*, 247 U. S. 97; *North Philadelphia Trust Co.* v. *Smith*, 13 F. (2d) 585 (C. C. A. 3rd); see *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169, 85 L. Ed. 176, 179, *leave to file second petition for rehearing granted*, 85 L. Ed. 1005 (not officially reported).

Under the New Jersey statutes as judicially construed, therefore, it is apparent that the trustees of a dissolved New Jersey corporation must act by at least a majority. A single liquidating trustee cannot, by his individual act, bind the trustees or the property of the dissolved corporations.

In upholding the validity of the waivers in the present case, though they were executed by only one of three trustees, and though such execution was without the knowledge or authority of the other trustees or of Mr. Hoffmann the Circuit Court of Appeals for the Third Circuit has decided an important question of local law in a way which conflicts with the applicable statutes and decisions of New Jersey.

Even if it be assumed, as the Circuit Court of Appeals indicates, that a dissolved corporation, like an existing corporation, may act through an agent, it is nevertheless clear that in the case of a dissolved corporation such agent, under the New Jersey law, must be authorized by at least a majority of the liquidating trustees. The undisputed evidence demonstrates, and the District Court so found, that William C. Krueger did not possess such authorization.

In any event, it does not appear that the Circuit Court of Appeals based its decision on the premise that Mr. Krue-

ger was authorized by his co-trustees to execute the waivers, though the opinion is not lucid in this respect. Rather, the Circuit Court of Appeals has taken the flat position that from the nature of his office, Mr. Krueger had at least implied power to waive the statute of limitations. Such position is in direct opposition to the New Jersey law.

The factors referred to in the opinion of the Circuit Court of Appeals as bearing on the question of the power to act are obviously of no significance. Thus, the fact that the corporate ownership was, in the main, vested in two families; that the directors were members by blood or marriage of the families; and that William C. Krueger was the son of the founder, cannot possibly operate to confer on Mr. Krueger the power to act after dissolution of the corporation in the face of explicit provisions of the New Jersey law to the contrary. Moreover, the fact that Mr. Krueger signed income tax returns for the years 1918, 1919, 1920, 1921 and 1922 can have no relation whatsoever to the power to sign waivers after dissolution. All returns with the exception of the 1922 return were filed before dissolution of the corporation, and the latter was signed shortly thereafter (R. 22, 23). It is true that a later return, not mentioned in the opinion, was filed for the fiscal year ended March 31, 1923 (R. 23). In all cases, however, Mr. Krueger was merely following the provisions of the Federal statutes requiring the signature of the president, vice-president or other principal officer of the corporation. Section 239 of the Revenue Acts of 1919 and 1921, 40 Stat. 1081; 42 Stat. 259. (The text of these Sections is annexed to this brief and is printed as Appendix H and I, respectively, thereto.) Hence, a signature on such returns could not imply a power of any other nature in the signer, particularly in the case of dissolved corporations governed by the New Jersey statutes. The Court further points to the fact that Mr. Krueger attended a conference in Washington with government rep-

resentatives. The established facts, however, as previously outlined, indicate that Mr. Krueger attended only one conference, the first, whereas Mr. Hoffmann, the authorized representative of the liquidating trustees, attended not only the first, but twenty-five or thirty additional conferences (R. 389-391, 405, 410, 444-445, 172-173, 26). Furthermore, the Government had knowledge of Mr. Krueger's lack of power or authority as is disclosed by its letter of December 19, 1924, as follows:

> "You are requested to have the power of attorney executed by the board of directors who under the laws of New Jersey are trustees in liquidation of the dissolved corporation" (R. 28, 200-201).

No factual circumstances can serve to avoid the legal requirement of the New Jersey law that the trustees in liquidation of a dissolved corporation must act by a majority. Even if this were not so, however, it is clear that the situation as described by the court, does not in any way tend to show an implied power in Mr. Krueger to act.

In essence, the present problem is simple: Mr. Krueger assumed to act with relation to the Waivers, but did not have the power or authority to act; a majority of the trustees, or Mr. Hoffmann, who had power to act, did not act, and had no knowledge of Mr. Krueger's acts; the Government, with whom Mr. Krueger dealt in executing the Waivers, had knowledge of Mr. Krueger's lack of power and authority.

It should be remarked parenthetically that if the opinion of the Circuit Court of Appeals be construed to hold that Mr. Krueger was in fact authorized by his co-trustees, a less likely interpretation, rather than that he had the power to act by virtue of his position, a basis for granting the writ of certiorari nevertheless exists, as will be demonstrated under Point B herein. The foundation of the decision must be either a finding of power in Mr. Krueger arising from the

nature of his position, or a finding of authority granted by a majority of the trustees. In either event, there is ample ground for the granting of the writ.

An examination of the authorities cited by the Circuit Court of Appeals reveals that none of them are controlling in the present litigation and, furthermore, that some of them, far from supporting the position of the Circuit Court of Appeals, tend to support the petitioners' contentions. All of the cases cited are easily distinguishable on one or more of the following grounds: (1) that the corporation involved was not dissolved at the time of the execution of the waiver, and therefore a State statute regulating the authority to act for a dissolved corporation, if such statute existed, was not applicable; (2) that the official signing the waiver possessed express or implied authority from those in whose hands the conduct of corporate affairs was vested; (3) that elements of an estoppel or an acquiescence existed; (4) that the official signing the waiver was the sole remaining corporate officer; (5) that the State law did not require majority action on the part of those in whose hands the conduct of corporate affairs was vested; (6) that a tax assessment was imposed, not against the dissolved corporation, but against a transferee of that corporation, and such transferee, who had himself signed the waiver, was estopped to deny its validity; and (7) that the validity of the waiver was not challenged on the ground that the person executing it was not authorized to act.

To cite an example, in *Continental Oil Co.* v. *United States*, 14 Fed. Supp. 533, cert. den. 301 U. S. 694, cited in footnote 17 of the opinion of the Third Circuit, the Court of Claims, in sustaining the validity of waivers executed by a corporate official of a dissolved corporation, explicitly points out, at page 538, that:

> "The Arizona statutes, unlike the statutes of most of the states, in that respect, make no provision as to

> who shall act for a dissolved corporation in closing up its business, and the decree of the court dissolving the Mutual Oil Company of Arizona does not designate liquidating trustees. In this situation the only persons who could act on behalf of the dissolved corporation in closing up its business, it still being a going concern for that particular purpose, would be its authorized officials of the date of dissolution. An officer of the corporation who had authority to execute tax waivers on its behalf before dissolution, in the absence of a showing to the contrary, would have like authority to act on its behalf during the period of its extended existence after dissolution for the purpose of closing up the business."

It would seem apparent that the Court of Claims, if confronted with the facts presented in the instant case, would, in the light of the *Continental Oil* case, render a decision directly opposed to the present holding.

Moreover, in 16 *Fletcher, Cyclopedia Corporations* (1933), sec. 8181, cited in footnote 18 of the opinion of the Circuit Court of Appeals, the learned author points out that ordinarily all the liquidating trustees must join in an act, or one must act with the authority of the others, citing, *inter alia, In re Delaware, etc., R. R. Co.*, 76 N. J. L. 163, which was discussed *supra* in this brief.

In view of the fundamental principle that the Federal courts must look to the law of the State of incorporation to determine the existence and extent of the authority to act in behalf of a dissolved corporation, it is not surprising to find a lack of authority in support of the decision of the Circuit Court of Appeals.

The importance of the question presented for the Court's consideration cannot be gainsaid. Not only is the sum of $126,533.90, plus interest, in taxes at issue, but of more vital importance, to the public at large, is the necessity, in this day of expanding governmental power, that the inter-

est of the citizen, and taxpayer, be protected. In times of stress and emergency, the tendency is almost universal, and understandably so, to favor the position of government at the expense of the individual. Nevertheless, it is of the essence of free government that the individual is entitled to all the protection given him by law. To secure such protection, there exists fortunately access to the courts.

The large number of cases which have arisen, involving the validity of tax waivers executed on behalf of a dissolved corporation, as well as the somewhat loose thinking frequently found in opinions on the subject, emphasizes the need for a definitive pronouncement by this Court. It is believed that a source of much wasteful litigation will be eliminated by a decision in the present matter.

Point B.

The holding of the Circuit Court of Appeals for the Third Circuit to the effect that William C. Krueger, one of the liquidating trustees of the dissolved corporation here involved, possessed implied authority from his co-trustees to waive the statute of limitations with regard to assessment of the Federal income and profits tax, disregarded and nullified the findings of fact of the District Court for the District of New Jersey, in conflict with the proper interpretation of Section 52 (a) of the Rules of Civil Procedure and with the decisions of other Circuit Courts of Appeals.

It is possible, as pointed out in Point A, *supra*, that the decision of the Circuit Court of Appeals for the Third Circuit is based on the premise that William C. Krueger, in waiving the statute of limitations, was authorized by his co-trustees, or enough of them to constitute a majority of all the co-trustees. While this construction of the opinion would appear far less likely than that considered in Point

A, *supra*, it is believed that completeness requires a showing that even under such an interpretation a ground for granting the writ of certiorari nevertheless exists.

An interpretation of the opinion to the effect that Mr. Krueger was authorized by his co-trustees might possibly be founded on the agency language employed by the court. Thus, it is said (R. 518-519):

> "The execution of the waivers is not the act of the trustees on dissolution. We think, however, that they are bound under settled principles of the law of agency. The liquidators both can and must act through others. The principles governing their agents should not differ from those applicable to the agents of the corporation itself."

If it be true that these words imply an authorization from a majority of the trustees, it is manifest that the Circuit Court of Appeals has in effect ignored the findings of fact of the District Court, which findings were fully supported by the evidence. The District Court found that neither Mr. Hoffmann nor the other liquidating trustees authorized William C. Krueger to waive the statute of limitations, nor did they have any knowledge of the receipt, execution and filing of the Waivers (R. 488, 489).

The effect of findings of fact is the subject of Rule 52 (a) of the Rules of Civil Procedure which provides, in part:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."
>
> (The full text of Rule 52 (a) is printed as Appendix F.)

There has been much confusion as to the proper interpretation of Rule 52 (a) and the decisions of various Circuit Courts of Appeal are in serious conflict.

Thus the Seventh Circuit has held that the phrase "clearly erroneous" in the Rule is merely a restatement of Mr. Justice Holmes' language in *Adamson* v. *Gilliland*, 242 U. S. 350, 352, to the effect that if there is any testimony consistent with the finding, it must be treated as "unassailable". *Santa Cruz Oil Corporation* v. *Allbright-Nell Co.*, 115 F. (2d) 604, 607; *Webb* v. *Frisch*, 111 F. (2d) 887, 888.

The Ninth Circuit now seems to be in accord with the Seventh Circuit, *Wittmayer* v. *United States*, 118 F. (2d) 808, 811, although formerly some doubt existed as to the correct interpretation of the Rule. See concurring opinion of Haney, C. J., in *Occidental Life Insurance Co.* v. *Thomas*, 107 F. (2d) 876, 879.

The Tenth Circuit enforces a rule similar to that of the Seventh although it requires substantial evidence in support of the findings to render them unassailable. *Continental Oil Co.* v. *Jones*, 113 F. (2d) 557, 564; *Kelly* v. *Aderhold*, 112 F. (2d) 118, 119. The First and Eighth Circuits, on the other hand, declare that the "substantial evidence" rule is no longer in force. *Manning* v. *Gagne*, 108 F. (2d) 718, 719 (C. C. A. 1st); *State Farm Mut. Automobile Ins. Co.* v. *Bonacci*, 111 F. (2d) 412 (C. C. A. 8th).

The Fourth Circuit holds that the findings of the lower court, "though entitled to weight, are persuasive only and not controlling." *Beckley Nat. Bank* v. *Boone*, 115 F. (2d) 513, 515.

The Eighth Circuit now adheres to the ruling of the Fourth Circuit, *Aetna Insurance Co.* v. *Kepler*, 116 F. (2d) 1, 5, though formerly the decisions had not been entirely consistent. *Storley* v. *Armour & Co.*, 107 F. (2d) 499, 505, 513; *State Farm Mut. Automobile Ins. Co.* v. *Bonacci*, 111 F. (2d) 412, 415; *Missouri Pac. Transp. Co.* v. *George*, 114 F. (2d) 757, 759.

The Third Circuit seems substantially in accord with the Eighth Circuit. *Kuhn* v. *Princess Lida of Thurn and Taxis*, 119 F. (2d) 704, 705.

It should be noted that commentators have observed the confusion existing among the Circuit Courts of Appeals, and have suggested that the problem is one to be settled ultimately by the Supreme Court. *Scope of Review of Findings*, 2 Fed. Rules Serv. at p. 672; *Ilsen and Hone, Federal Appellate Practice as Affected by the New Rules of Civil Procedure*, 2 Fed. Rules Serv. L. R. 23, at p. 736 (abridged from 24 Minn. L. Rev. 1). The importance of settling the conflict by an authoritative interpretation of Rule 52 (a) would seem to be apparent.

The need for such interpretation is well illustrated in the present case where the Circuit Court of Appeals for the Third Circuit, assuming that it found that Mr. Krueger was authorized by his co-trustees, has clearly exceeded its power with respect to the findings of the lower court.

The District Court's findings were not only supported by substantial evidence but by the overwhelming weight of the evidence. Both Mr. Uppercu and Mr. Barrett, the co-trustees of Mr. Krueger, and Mr. Hoffmann testified without contradiction that they had no knowledge whatever of the execution of the waivers (R. 391-392, 405, 410-411). Moreover, it was not Mr. Krueger who was appointed by the liquidating trustees to handle the tax matters, but Mr. Hoffmann (R. 389-390, 405, 410, 445). The latter attended at least twenty-five or thirty conferences with government officials in order to dispose of the tax claims, whereas Mr. Krueger accompanied him merely at the first conference (R. 390-391, 444-445). Thus, the evidence indicates that not only did Mr. Krueger lack authority of any nature, but that the only authority delegated by the liquidating trustees was that vested in Mr. Hoffmann.

In the light of this record, the District Court's findings were fully supported, and the Circuit Court of Appeals was not at liberty, under Rule 52 (a) to ignore such findings.

POINT C.

The Circuit Court of Appeals for the Third Circuit in denying on the ground that the claim was untimely, the right of the petitioners to a reduction of their assessment in accordance with an amendment to their claim for refund, which amendment was filed after the period for filing claims, but which involved claims concerning which the Government was put on notice by virtue of its consideration of the original claim and briefs filed in support thereof, has decided a Federal question in a way probably in conflict with the decisions of this Court.

Since the Circuit Court of Appeals found against the petitioner on the First Count of the Complaint, it became necessary to decide the Second Count, relating to the amended claim for refund based on obsolescence. On the authority of *United States* v. *Andrews*, 302 U. S. 517, and *United States* v. *Garbutt Oil Co.*, 302 U. S. 528, the court found for the respondent on the Second Count on the sole ground that the claim based on obsolescence was untimely filed. The issue, therefore, does not concern the merits of the claim, a point not decided, but rather the validity of the court's ruling that the claim was barred by the statute of limitations.

As to the merits of a claim based on obsolescence arising from the enactment of prohibition legislation, see *Plymouth Brewing & Malting Co.*, 16 B. T. A. 123 which follows, *Renziehausen* v. *Commissioner of Internal Revenue*, 31 F. (2d) 675, *aff'd*, 280 U. S. 387. In the *Plymouth* case, it was held that experiments in an endeavor to develop a process for the manufacture of near beer did not deprive the tax-

payer of the right to take its loss in the year when the property became obsolete. As the Board states, at page 129:

> "We think the abortive experiments of the petitioner in the following year are demonstrative of the uselessness of the assets rather than of their usefulness."

The applicable statute of limitations is Section 284 (b) (1) of the Revenue Act of 1926, 44 Stat. 66, providing that claims for refund, in the case of taxes imposed by prior Acts, must be filed within four years from the time the tax was paid. (See Appendix E for text of Section 284.)

Where, as in this case, an amended claim has been filed after the time limited in the foregoing statute, such claim is proper, under the decisions of this Court, when the facts upon which the amendment is based would necessarily have been ascertained by the Commissioner in determining the merits of the original claim. The determinative factor is whether, in pursuance of normal administration procedure, consideration of the original claim would lead the Commissioner into the field covered by amendment. *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62; *United States* v. *Prentiss Co.*, 288 U. S. 73; *United States* v. *Factors & Finance Co.*, 288 U. S. 89; *Bemis Bros. Bag Co.* v. *United States*, 289 U. S. 28.

The principle set forth is in accord with the interpretation given to the Supreme Court cases by the Second Circuit in *Pink* v. *United States*, 105 F. (2d) 183, and with the interpretation formerly given by the Third Circuit itself in *Allegheny Heating Co.* v. *Lewellyn*, 91 F. (2d) 280.

To illustrate, in *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, the taxpayer filed a timely claim for refund which was general in nature, and did not specify grounds. After the statute of limitations had run, he filed an amendment describing the facts. The amendment was sustained since, on the filing of a general claim, the Commissioner was

led by the normal course of administrative procedure into a complete audit which necessarily put him on notice of the facts on which the amendment was based.

In *United States* v. *Prentiss & Co.*, 288 U. S. 73, on the other hand, the taxpayer filed a timely claim for refund on the ground that he should have the benefit of a special assessment under Section 327 (d) of the Revenue Act of 1918 since abnormal conditions affected his invested capital and income. In response to the Commissioner's request, the taxpayer acquiesced in the statutory net income and invested capital as set forth in a revenue agent's report. Subsequently, the taxpayer filed an untimely claim alleging undervaluation of real estate and exclusion of intangibles. Mr. Justice Cardozo, in a penetrating opinion, held the rejection of the untimely claim proper. Here, it may be noted, the taxpayer had, in his original claim, abandoned the position that there had been any error of law or fact in the assessment. The request for a special assessment under Section 327 (d) assumes the correctness of the prior assessment. Hence, as Mr. Justice Cardozo aptly points out, the original claim did not suggest the need for a search into the facts on which the untimely claim was based.

In *United States* v. *Factors & Finance Co.*, 288 U. S. 89, the timely claim did not specify any grounds. After the statute of limitations had run, an amendment set forth reasons for a special assessment under Section 210 of the Act of 1917. The amendment was held proper. In the first place, the taxpayer had not, in his original claim, abandoned other grounds, as was the case in *United States* v. *Prentiss & Co.* Furthermore, a special assessment under Section 210 differs from that under Section 327 (d) in that, under the former, the value of invested capital is important. Under the former, the Commissioner acts of his own motion whenever he is unable to satisfy himself that the valuation will be accurate if there is adherence to the

statute. Hence, as Mr. Justice Cardozo states, the Commissioner must be deemed to have considered the question of special assessment under Section 210 when the taxpayer submitted his original claim.

In *Bemis Bros. Bag Co.* v. *United States,* 289 U. S. 28, a timely claim for refund demanded a special assessment under Sections 327 and 328 of the Act of 1918, placing the right to relief on the following grounds: (1) that the Commissioner was unable to determine invested capital in the ordinary way, (2) that a mixed aggregate of tangible and intangible property had been paid for in stock, and the Commissioner was unable to determine the respective values of the several classes of property, and (3) that abnormal conditions affected the taxpayer's invested capital and income. After the statute of limitations had run, an amended claim asked that if the special assessments were denied, items improperly eliminated from invested capital should be restored. The amendment was held proper since the taxpayer's grounds (1) and (2) gave the Commissioner notice that the taxpayer's invested capital may have been erroneously assessed. Under normal administrative procedure, the commissioner in considering grounds (1) and (2) would look into matters covered by the amendment.

In the instant case, the petitioners' tax returns for the fiscal years ended March 31, 1919, 1920 and 1921 claimed a loss for obsolescence caused by the enactment of prohibition legislation (R. 78-125). The report of the Government engineer, accepted and acted upon by the Government, found that the net depreciated cost of the properties of the United States Brewing Company used in the manufacture of beer was $1,667,646.82 (R. 207). These properties were sold for $735,000, resulting in a loss of $932,646.82. The engineer found, and by its acceptance of his report, the Government determined that Prohibition Legislation was the sole cause of the loss (R. 217). Never-

theless the Government allowed but $533,442.49 of the loss for the reason, as stated by the engineer, that two of the breweries were operated intermittently in experimentation with near beer (R. 206).

Original claims for refund were filed by petitioners on February 6, 1930, for the fiscal years March 31, 1919, 1920 and 1921 on the ground that the assessment and collection of the taxes paid were barred by the applicable statute of limitations (R. 31).

In considering the original claims, the Government interposed the defense of estoppel. The petitioners, to rebut the defense, filed memoranda dated August 25, 1931 and January 20, 1932 claiming that the Government was unable to prove the elements necessary to establish an estoppel (R. 331, 341). In the memoranda, these elements were discussed substantially as follows: (1) There must be a misrepresentation of an existing fact. Neither Mr. Krueger, Mr. Hoffmann, or the other trustees misrepresented any facts. (2) There must be reliance without knowledge of the true facts. The Commissioner had knowledge of Mr. Krueger's lack of authority when he, the Commissioner, rejected a power of attorney signed by Mr. Krueger. (3) There must be a change of position to the detriment of the party claiming estoppel. Although the Commissioner determined the loss on obsolescence to be $932,646.82, only $533,442.49 was allowed and the balance was disallowed on the erroneous theory that unsuccessful experiments postponed the loss. The dissolved corporation did not owe the taxes assessed against and collected from it and, therefore, without regard to the timeliness of the assessment, no taxes were due. Hence the Government could have suffered no detriment. The detriment, in fact, was suffered by the taxpayer who, after the rejection of the power of attorney of Mr. Treanor, was without representation by tax counsel.

As pointed out by the petitioners in their memoranda, it is apparent that the Commissioner, in the normal course of administrative procedure, in considering the defense of estoppel to the original claims, must necessarily ascertain whether the Government had suffered a detriment, which in turn compelled a determination as to what tax was in fact due. Such determination obviously led into the field of obsolescence.

It is apparent, therefore, that petitioners' amendments to the claims for refund, filed August 11, 1932, claiming that they were entitled to deduct the entire loss caused by Prohibition Legislation without regard to the experiments with near beer, were entirely proper, under the Supreme Court decisions cited. In considering the petitioners' timely claim, the Commissioner would, in the normal course of administrative procedure, be led into the field covered by the petitioners' amendment. The Circuit Court of Appeals for the Third Circuit, therefore, in holding the petitioners' amendments improper, has decided a question of Federal law in a way probably in conflict with the decisions of this Court.

United States v. *Andrews*, 302 U. S. 517, and *United States* v. *Garbutt Oil Co.*, 302 U. S. 528, relied upon by the Circuit Court of Appeals, are factually distinguishable. There, the purported amendments were totally unrelated to the original claims. In the *Andrews* case, the timely claim was based on a loss due to worthlessness of stocks in two specified corporations. Consideration of this claim obviously did not lead into the field covered by the purported amendment, namely, whether a certain sum reported as a dividend was in fact the proceeds of the sale of stock of the Hanna Company.

In the *Garbutt Oil* case, the timely claim alleged two grounds for refund: (1) that a deduction should be allowed for amortization of a drilling contract, and (2) that

the taxpayer's invested capital should have been increased so as to embrace the unrecovered cost of this drilling contract. The purported amendment claimed that the taxpayer had no income whatever since it had distributed the oil it drilled in kind. As Mr. Justice Roberts observed, the original claim assumed the receipt of some income, at least, and was therefore the direct negation of the purported amendment.

This Court, in the *Andrews* and *Garbutt* cases, followed the rules established by its own earlier decisions, but distinguished the latter decisions on the facts.

It is submitted, therefore, that the decision of the Court of Appeals for the Third Circuit is probably in conflict with the decisions of this Court.

POINT D.

The Circuit Court of Appeals for the Third Circuit in denying on the ground that the claim was untimely, the right of the petitioners to a reduction of their assessment in accordance with an amendment to their claim for refund, which amendment was filed after the period for filing claims but which involved claims concerning which the Government was put on notice by virtue of its consideration of the original claim and briefs filed in support thereof, has rendered a decision in conflict with a decision of the Circuit Court of Appeals for the Second Circuit and with decisions of the Court of Claims.

In *Pink* v. *United States*, 105 F. (2d) 183, the Circuit Court of Appeals for the Second Circuit had before it a case where the taxpayer filed a timely claim for refund on the ground that it was an insurance company taxable under section 246 of the Revenue Act of 1926, and should have paid at the rate of only 12½ per cent of its net income. After the statute of limitations had run, a claim for refund

was filed on the ground that the taxpayer was taxable as an insurance company and had erroneously included in its return of gross income certain fees and profits on the sale of capital assets. Judge Swan held that the untimely claim was a proper amendment since the original claim involved a determination of whether insurance was the taxpayer's predominant business, and this determination involved an investigation of the sources of income, which investigation would lead the Commissioner to the fees in question under the amendment. As the Court states, at page 187:

> "Whether a new ground of recovery may be introduced after the statute has run by amending a pending claim filed in time depends upon the facts which an investigation of the original claim would disclose. Where the facts upon which the amendment is based would necessarily have been ascertained by the commissioner in determining the merits of the original claim, the amendment is proper. Bemis Bros. Bag Co. *v.* United States, 289 U. S. 28, 53 S. Ct. 454, 77 L. Ed. 1011; United States *v.* Memphis Cotton Oil Co., 288 U. S. 62, 53 S. Ct. 278, 77 L. Ed. 619; United States *v.* Factors & Finance Co., 288 U. S. 89, 53 S. Ct. 287, 77 L. Ed. 633. The rule is otherwise when the amendment requires the examination of new matters which would not have been disclosed by an investigation of the original claim. United States *v.* Andrews, 302 U. S. 517, 58 S. Ct. 315, 82 L. Ed. 398; United States *v.* Garbutt Oil Co., 302 U. S. 528, 58 S. Ct. 320, 82 L. Ed. 405; Marks *v.* United States, 2 Cir., 98 F. (2d) 564. We think the present case falls within the former rule."

Without reviewing the relevant facts of the present case, as outlined in the Argument under Point C, *supra*, attention is directed to the close analogy between the *Pink* case and the instant matter. In both instances the determination of the original claim involved, under normal administrative practice, an investigation which would lead to the matters described in the amended claim for refund.

While the Circuit Court of Appeals for the Third Circuit purports to base its decision on the ground that no relation exists between the amendment and the original claim, it is manifest that the Third Circuit has not adopted the same tests as those employed by the Second Circuit. The Third Circuit does not reveal how close a relationship, in its view, is requisite, but on the basis of the holding it may at least be said that the Third Circuit demands a much closer relationship than that required by the Second Circuit.

It may also be said that the present holding of the Third Circuit is, in effect, contrary to the rule of the Seventh Circuit in *United States* v. *Elgin Nat. Watch Co.*, 66 F. (2d) 344, although the factual analogy between the two cases is not as precise as that between the instant case and the *Pink* case.

In the *Elgin* case, the taxpayer filed a timely claim for refund for the entire amount of the tax paid by it. After the statute of limitations had run, it filed briefs which were considered by the Court to be amendments, in which it sought a special assessment under Section 328 of the Revenue Act of 1918. The Court sustained the amendments and, after discussing the general claims filed in *United States* v. *Factors & Finance Co.*, 288 U. S. 89, stated as follows, at page 347:

> "The original claim filed by taxpayer is of equally sweeping generality, and if the Commissioner had considered it, he would have easily discovered, as did the Board and the District Court, that taxpayer's invested capital as defined in section 328 of the statute could not be determined. It will not do to say that this fact did not occur to him, for it is quite clearly involved in the original claim which sought a refund of the entire tax. In Lewis *v.* Reynolds, 284 U. S. 281 at page 283, 52 S. Ct. 145, 146, 76 L. Ed. 293, the court said:
>
> "'* * * the ultimate question presented for decision upon a claim for refund, is whether the tax-

payer has overpaid his tax. This involves a redetermination of the entire tax liability.' "

In *Youngstown Sheet and Tube Co.* v. *United States*, 7 Fed. Supp. 290, *cert. den.*, 293 U. S. 599, the Court of Claims had before it a timely claim for refund assigning as a specific ground deductions from gross income. After the statute of limitations had run, the taxpayer filed an amended claim seeking additional deductions which were not set forth in the original claim. The Court permitted the amendment. *United States* v. *Prentiss & Co.*, 288 U. S. 73, was distinguished on the ground that the case before the Court of Claims, unlike the *Prentiss* case, involved two claims, both on statutory grounds. Further, the issue in the original claim involved an error of law or fact or both, and not only suggested, but resulted in a complete re-audit. At page 294, the Court observes:

"There is no question that the plaintiff has overpaid its 1922 taxes; that the amount so overpaid should be returned; that a timely formal claim was before the Commissioner; that every item in the amended claim was acted upon and well known to the Commissioner before the amended claim was filed; that the Commissioner was not taken by surprise by the second claim when he took action on both claims; and that all the equities are with the plaintiff. Only by a narrow construction of the right to amend can the plaintiff be debarred from recovery."

Under the holding of the Court of Claims, the present matter becomes an *a fortiori* case. There was very little in the original claim filed in the *Youngstown* case to suggest the problems raised in the amended claim. In the present controversy, on the other hand, the Commissioner was on notice of all matters raised in the amended claim,

by virtue of the original claim and briefs submitted in connection therewith. Moreover, the Commissioner's own defense to the original claim involved a consideration of the problem presented in the amended claim.

Hence, the ruling of the Third Circuit, denying effect to the amended claim, is clearly contrary to the decision of the Court of Claims in the *Youngstown* case.

The *Youngstown* case was followed by the Court of Claims in *Con. P. Curran Printing Co.* v. *United States*, 15 Fed. Supp. 153, *cert. den.* 301 U. S. 686. In the latter case a timely claim for refund was filed on the basis of an "inadequate depreciation taken on the return". The taxpayer also sought to have invested capital increased on account of the cost of type and forms used in its business. After the statute of limitations had run, an amended claim was filed seeking deduction for exhaustion of the value of the leasehold. On the authority of the *Youngstown* case, the amendment was upheld.

The comparison made between the *Youngstown* case and the present case is equally applicable to the *Curran* case. Under the *Curran* decision the facts of instant case present an *a fortiori* situation.

Moreover, a conflict between the Court of Claims and a Circuit Court of Appeals on the same matter should be, it is submitted, a sufficient reason for granting a writ of certiorari. See *8 Hughes, Federal Practice* (1931), sec. 6301, fn. 2.

To summarize Point D of the argument, the Circuit Court of Appeals for the Third Circuit has rendered a decision in conflict with the decisions of the Circuit Courts of Appeals for the Second and Seventh Circuits, and in conflict with two decisions of the Court of Claims on the same matter.

Point E.

The Circuit Court of Appeals for the Third Circuit in denying on the ground that the claim was untimely, the right of petitioners to a reduction of their assessment in accordance with an amendment to their claim for refund, which amendment was filed after the period for filing claims, but which involved claims concerning which the Government had notice by virtue of its consideration of the original claim and briefs filed in support thereof, has decided an important question of Federal law which has not been, but should be, settled by this Court.

If it should be felt that the present decision of the Circuit Court of Appeals for the Third Circuit is not precisely in conflict with decisions of this Court, it is submitted that the Third Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court.

In *United States* v. *Andrews*, 302 U. S. 517, this Court criticized the reasoning of the Court of Claims in *Youngstown Sheet & Tube Co.* v. *United States*, 7 Fed. Supp. 290, *cert. den.*, 293 U. S. 599, and in *Con. P. Curran Printing Co.* v. *United States*, 15 Fed. Supp. 153, *cert. den.* 301 U. S. 686. The court went on to say, however, at page 527:

> "We express no opinion as to whether the result may be sustained by the fact that while the original claim was pending the Commissioner was fully apprised of the items of deduction ultimately claimed in the amendment by two complete audits of the taxpayer's affairs and accounts."

The instant case presents a situation similar to that found in the *Youngstown* and *Curran* cases. A timely claim for refund was filed on a given ground. Subsequently, and after the statute of limitations had run, an amendment was filed on another ground. While the original claim was pending, however, the Commissioner was apprised of the matters

claimed in the petitioners' amendment by reason of his consideration of his defenses to the original claim.

As indicated in the above quotation, this Court was not called upon to express an opinion on this or a similar set of facts in the *Andrews* case and therefore left the matter open.

That the question is important, and one which should be settled by this Court, is illustrated by the very fact that at least four cases have in recent years been before the Circuit Courts of Appeals and the Court of Claims involving substantially the same situation. *Pink* v. *United States*, 105 F. (2d) 183; *Youngstown Sheet & Tube Co.* v. *United States*, 7 Fed. Supp. 290, *cert. den.* 293 U. S. 599; *Con. P. Curran Printing Co.* v. *United States*, 15 Fed. Supp. 153, *cert. den.* 301 U. S. 686; and the present case. Large sums were in each instance involved. It would seem reasonable to suppose that the question will frequently arise in future litigation unless the matter is settled by a definitive opinion. This Court has in the past eliminated many of the sources of litigation involved in the problem of amended claims for refund, in cases cited elsewhere in this brief. The present case involves what is perhaps the major remaining source of litigation in this field of tax law. Especially in the law of taxation, certainty should be a primary consideration. Hence, the removal of doubt on the questions here presented should be of great benefit to the taxpaying public.

Conclusion.

Several grounds have been urged in the present case as indicating that the matter is one appealing to the discretion exercised by this Court in issuing its Writ of Certiorari. It has been, and is, submitted: first, that the holding of the Third Circuit to the effect that less than a majority of the liquidating trustees of a dissolved New Jersey corporation had power to bind the corporation to a waiver of the statutes limiting the time within which Federal income and profits

taxes may be assessed, conflicts with the controlling statutes and decisions of New Jersey; second, that the Third Circuit's holding to the effect that William C. Krueger, one of the liquidating trustees, possessed implied authority from his co-trustees to waive the said statute of limitations, disregards and nullifies the findings of fact of the District Court in conflict with the proper interpretation of Rule 52 (a) of the Rules of Civil Procedure, and with the decisions of other Circuit Courts of Appeals; third, that the denial by the Third Circuit, on the ground that the claim was untimely, of the right of petitioners to a reduction of their assessment in accordance with an amendment to their claim for refund, which amendment involved problems concerning which the government was put on notice by virtue of its consideration of the original claim and briefs filed in support thereof, is a decision on a Federal question which is probably in conflict with the decisions of this Court; fourth, that by denying the petitioners' rights, under the same circumstances, the Third Circuit has rendered a decision in conflict with decisions of the Second and Seventh Circuits and of the Court of Claims; and fifth, that by denying the petitioners' rights, under the aforesaid circumstances, the Third Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court.

Further, it is urged that the present matter is of importance, not only to the petitioners themselves, but to the public at large. Particularly in these critical times, when the tendency is widespread to favor the government at the expense of the individual, it is important that the citizen and taxpayer be given the full protection to which he is by law entitled. Moreover, the questions here presented have been a fruitful source of costly litigation, and, it is believed they will continue to be, unless this Court resolves the confusion which seems to exist on the points involved.

Your petitioners ask, therefore, that this Court grant a writ of certiorari to the Circuit Court of Appeals for the Third Circuit, as prayed in the foregoing petition.

Respectfully submitted,

ARTHUR T. VANDERBILT,
Counsel for Petitioners.

APPENDIX A.

Section 31 of the Corporation Act of the State of New Jersey, R. S. 14:13-1.

Every corporation organized under this title may be dissolved in the following manner:

The board of directors shall pass a resolution, declaring it advisable and most for the benefit of the corporation that it be dissolved and calling a meeting of the stockholders to take action thereon. The meeting shall be held upon such notice as the by-laws provide, and in the absence of such provision, upon ten days' notice given personally or by mail. If two-thirds in interest of all the stockholders, whether with or without voting powers and without regard to class, shall at such meeting or at any adjournment thereof vote in favor of the dissolution of the corporation and consent thereto in writing, a certificate of such dissolution shall be made by the corporation under its seal and the hands of the president or vice president and the secretary or assistant secretary. The certificate shall be acknowledged or proved as in the case of deeds of real estate, and, together with such consents in writing and a list of the names and post-office addresses of the directors or officers certified as aforesaid, shall be filed in the office of the secretary of state, who shall thereupon issue a certificate that such certificates and consents have been filed. Upon the issuance of such dissolution certificate by the secretary of state the corporation shall thereupon be dissolved, except as hereinafter provided, and the board of directors shall proceed to settle up and adjust its business and affairs, except that the consent in writing of the stockholders may fix a date subsequent to the date of the issuance of such certificate by the secretary of state as the date on which the dissolution shall take effect, which shall be stated in the certificate issued by the secretary of state. Whenever all the stockholders shall consent in writing to a dissolution, no meeting or notice thereof shall be necessary, but on filing such consents in the office of the secretary of state he shall forthwith issue a dissolution certificate. The board of directors shall in every case cause such certificate of the secretary of state to be published for three weeks successively, at

least once in each week, in a newspaper published in the county in which the principal office of the corporation was last located, and shall, after the completion of such publication, file proof thereof in the office of the secretary of state.

APPENDIX B.

Section 54 of the Corporation Act of the State of New Jersey, R. S. 14:13-5.

Upon the dissolution in any manner of any corporation, the directors shall be trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell and convey the property and divide the moneys and other property among the stockholders, after paying its debts, as far as such moneys and property shall enable them. They may meet and act under the by-laws of the corporation, and, under regulations made by a majority of such trustees, prescribe the terms and conditions of sale of such property, and may sell all or any part for cash, or partly on credit, or take mortgages and bonds for part of the purchase price for all or any part of such property. They may sell, exchange or invest in bonds of the home owners' loan corporation or other agencies of the federal government for cash, securities or other instruments held by them as such trustees.

In case of a vacancy or vacancies in the board of directors of the corporation existing at the time of dissolution or occurring subsequent thereto, the remaining directors or director shall be the trustees or trustee thereof, as the case may be, with all of the above powers, and may do and perform all such other acts as shall be necessary to carry out the provisions of this title relative to the winding up of the affairs of the corporation and the distribution of its assets.

APPENDIX C.

Section 73 of the Corporation Act of the State of New Jersey, R. S. 14:14-8.

Everything required by this title to be done by receivers or trustees shall be good and effectual, to all intents and purposes, if performed by a majority.

APPENDIX D.

Section 277 (a) (2) and (a) (3) Revenue Act of 1926, 44 Stat. 58.

(2) The amount of income, excess-profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by the Revenue Act of 1924, shall be assessed within four years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(3) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

APPENDIX E.

Section 284 (a) to (h) inclusive of the Revenue Act of 1926, 44 Stat. 66.

(a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as

provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

(c) If the invested capital of a taxpayer is decreased by the Commissioner, and such decrease is due to the fact that the taxpayer failed to take adequate deductions in previous years, with the result that there has been an overpayment of income, war-profits, or excess-profits taxes in any previous year or years, then the amount of such overpayment shall be credited or refunded, without the filing of a claim therefor, notwithstanding the period of limitation provided for in subdivision (b) or (g) has expired.

(d) If the Commissioner has mailed to the taxpayer a notice of deficiency under subdivision (a) of section 274 and if the taxpayer after the enactment of this Act files a petition with the Board of Tax Appeals within the time prescribed in such subdivision, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As provided in subdivision (e) of this section or in subdivision (i) of section 279 or in subdivision (b), (f), or (i) of section 283 or in subdivision (d) of section 1001; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

(3) As to any amount collected after the statutory period of limitations upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Board which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

(e) If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer as provided in subdivision (a). Such refund or credit shall be made either (1) if claim therefor was filed within the period of limitation provided for in subdivision (b) or (g), or (2) if the petition was filed with the Board within four years after the tax was paid, or, in the case of a tax imposed by this Act, within three years after the tax was paid.

(f) Where there has been an overpayment of tax under section 221 or 237 any refund or credit made under the provisions of this section shall be made to the withholding agent unless the amount of such tax was actually withheld by the withholding agent.

(g) If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return

was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid. If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. If the taxpayer has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 or 1921, then such credit or refund relating to the taxes for the taxable year 1920 or 1921 shall be allowed or made if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid. If any such waiver so filed has, before the expiration of the period thereof, been extended either by the filing of a new waiver or by the extension of the original waiver, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either (1) within four years from the time the tax was paid, or (2) on or before April 1, 1926, in the case of credits or refunds relating to the taxes for the taxable years 1917 and 1918, or on or before April 1, 1927, in the case of credits or refunds relating to the taxes for the taxable year 1919, or on or before April 1, 1928, in the case of credits or refunds relating to the taxes for the taxable years 1920 and 1921. This subdivision shall not authorize a credit or refund prohibited by the provisions of subdivision (d).

(h) Except as provided in subdivision (d) this section shall not (1) bar from allowance a claim for credit or refund filed prior to the enactment of this Act which but for such enactment would have been allowable, or (2) bar from allowance a claim in respect of a tax for the taxable year 1919 or 1920 if such claim is filed before the expiration of five years after the date the return was due.

APPENDIX F.

Section 52 (a) of the Federal Rules of Civil Procedure.

In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court.

APPENDIX G.

R. S. Section 721, Act of September 24, 1789, c. 20, sec. 34, 1 Stat. 92.

The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.

APPENDIX H.

Section 239 of the Revenue Act of 1919, 40 Stat. 1081.

That every corporation subject to taxation under this title and every personal service corporation shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer or assistant treasurer. If any foreign corporation has no office or place of business in the United States but has an agent in the United States, the return shall be made by the agent. In cases where receivers, trustees in bankruptcy, or assignees are operating the property or business of

corporations, such receivers, trustees, or assignees shall make returns for such corporations in the same manner and form as corporations are required to make returns. Any tax due on the basis of such returns made by receivers, trustees, or assignees shall be collected in the same manner as if collected from the corporations of whose business or property they have custody and control.

Returns made under this section shall be subject to the provisions of sections 226 and 228. When return is made under section 226 the credit provided in subdivision (c) of section 236 shall be reduced to an amount which bears the same ratio to the full credit therein provided as the number of months in the period for which such return is made bears to twelve months.

APPENDIX I.

Section 239 of the Revenue Act of 1921, 42 Stat. 259.

(a) That every corporation subject to taxation under this title and every personal service corporation shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer or assistant treasurer. If any foreign corporation has no office or place of business in the United States but has an agent in the United States, the return shall be made by the agent. In cases where receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations, such receivers, trustees, or assignees shall make returns for such corporations in the same manner and form as corporations are required to make returns. Any tax due on the basis of such returns made by receivers, trustees, or assignees shall be collected in the same manner as if collected from the corporations of whose business or property they have custody and control.

(b) Returns made under this section shall be subject to the provisions of sections 226 and 228. When return is made under section 226 the credit provided in subdivision (b) of section 236 shall be reduced to an amount which

bears the same ratio to the full credit therein provided as the number of months in the period for which such return is made bears to twelve months.

(c) There shall be included in the return or appended thereto a statement of such facts as will enable the Commissioner to determine the portion of the earnings or profits of the corporation (including gains, profits, and income not taxed) accumulated during the taxable year for which the return is made, which have been distributed or ordered to be distributed, respectively, to its stockholders or members during such year.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 670

WILLIAM C. KRUEGER, HUGH C. BARRETT AND INGLIS M. UPPERCU, AS SURVIVING TRUSTEES IN LIQUIDATION OF UNITED STATES BREWING COMPANY, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the United States District Court for the District of New Jersey (R. 496–500) is reported in 33 F. Supp. 102. The opinion of the United States Circuit Court of Appeals for the Third Circuit (R. 514–521) is reported in 121 F. (2d) 842.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 30, 1941 (R. 521). The petition for writ of certiorari was filed September 30, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether in the circumstances of this case the liquidating trustee actively in charge of winding up the affairs of a dissolved New Jersey corporation, although not expressly authorized by a majority of the trustees, had implied authority to execute waivers extending the statutory period for the assessment and collection of taxes.

2. Whether, in any event, the trustees are estopped to recover the taxes.

3. Whether amendments to timely claims for refund were barred where filed after the statutory period and where based on alleged insufficient allowances for obsolescence, the original claims having been based on the ground that the assessment of the taxes was barred by the statute of limitations.

STATUTES INVOLVED

The pertinent portions of the statutes involved are quoted in the Appendix, *infra,* pp. 17–24.

STATEMENT

This is a suit by the petitioners as the surviving trustees in liquidation of United States Brewing Company, a New Jersey corporation, to recover cer-

tain income and profits taxes which were assessed against the Company for periods prior to its dissolution on July 10, 1922, and which were paid on December 15, 1926, out of funds of the Company by a check signed by two of the petitioners (R. 30–31, 490). The complaint contains two counts (R. 3–13), the second of which is relied on by the petitioners if recovery under the first is denied (Pet. 6). The district court granted recovery under the first count (R. 500–502) and accordingly found it unnecessary to pass upon the second (R. 495). The circuit court of appeals reversed the judgment of the district court, holding that no recovery could be had under either count.

The facts, as they appear from documentary evidence or as stipulated or found by the district court, may be summarized as follows:

First Count: In this count the petitioners allege that they are entitled to recover the full amount of taxes paid in 1926, covering, exclusive of interest, the following:

Deficiency for period January 1, 1918, to March 31, 1918	$4,885.19
Deficiency for fiscal year ended March 31, 1919	38,206.46
Deficiency for fiscal year ended March 31, 1920	87,241.61
Deficiency for fiscal year ended March 31, 1921	1,086.83

The alleged grounds for recovery are that these taxes were assessed and collected beyond the statutory periods of limitation and that waivers extending the periods were void because not authorized by a majority of the liquidating trustees. Since on oral argument before the district court peti-

tioners withdrew their claim to the $4,885.19 tax (R. 477, Pet. 6), the only issues are with respect to the taxes for 1919, 1920, and 1921. ~~for the execution of the waivers.~~

Under Section 277 (a) (2) and (3) of the Revenue Act of 1926 (Appendix, *infra,* p. 17), the time for the assessment and collection of the taxes for these years expired on May 15, 1925, June 5, 1925, and June 11, 1926, respectively (R. 23. Cf. R. 489; Pet. 5). The taxes were not assessed until October 1926; they were paid, as aforesaid, on December 15, 1926 (R. 30). Prior to these dates, however, various waivers were executed the last four of which, if valid, extended the time for assessment and collection to December 31, 1926, for each of the years 1918, 1919, 1920, and 1921 (R. 25, 27, 29, 164, 184, 227–234).[1]

The four waivers referred to were executed on December 14, 1925 (R. 29, 227–234). They were signed for the Company in liquidation by "Wm. C. Krueger Vice Pres." He was vice president of the Company prior to its dissolution and thereafter vice chairman of the board of liquidating trustees. The waivers were stamped by the corporate seal and, in addition, signed by Hugo

[1] Claims for refund filed in February 1930 (R. 301–330) were rejected by the Commissioner upon the grounds that the $4,885.19 tax had been assessed and collected within the statutory period, a claim in abatement having been filed, and that as to the other taxes the waivers were valid (R. 358–359, 363–364).

Boepple, Jr., as assistant secretary.[2] The district court found that the other two liquidating trustees never authorized Krueger or Boepple to sign the waivers and that the receipt, execution, and filing of the waivers was not called to their attention or discussed with them (R. 489).

The district court also found, however, that the Company's tax returns for the years 1918 to 1923 had been signed by Krueger and Boepple, or Krueger and the treasurer, who died September 8, 1922, and for the year ended subsequent to the dissolution, by Krueger alone (R. 484–485. See also R. 23, 140–143), and that during the period in controversy when the waivers were executed Krueger was "the only trustee of the corporation dealing at first hand with its affairs," the other trustees being inactive (R. 491). The district court further found that in not assessing the taxes until after the statutory periods the Commissioner relied upon the waivers signed by Krueger (R. 491).

The waivers were executed at the suggestion or request of the Bureau to enable it to consider all the information at hand "or any which you (the Company) may wish to submit later" and to

[2] The President of the Company and Chairman of the trustees prior to his death in 1926 was Gottfried Krueger, the father of William C. Krueger (R. 23). Boepple was assistant secretary of the Company prior to dissolution and thereafter was assistant secretary of the liquidating trustees (R. 487–488). He was in charge of the Company's books and records (R. 422–425).

avoid the necessity of an immediate assessment of additional taxes (R. 29, 224–225, 485). The following circumstances form the background.

By letter of December 12, 1923, the Company had requested the Commissioner to direct that a then pending investigation into the Company's accounts for 1918 and 1919 be extended to include those for the following years to the date of dissolution because of the impossibility of completing the liquidation "until the taxes due the Federal Government have been fully ascertained" (R. 24, 149). On January 30, 1924, after the Company had received a report of its tax liability for 1918 and 1919, it wrote to the Internal Revenue Agent in Charge at Trenton, New Jersey, advising him that it would protest certain of the findings in the report and requesting permission to delay filing a brief in support of its protest "until the present examination [of its returns to the date of dissolution] is completed" (R. 24, 150). In response to this request the Company was notified that additional time for filing the brief would be granted if a waiver were executed, the limitation period for the 1918 and 1919 taxes under the statute then applicable otherwise expiring March 1, 1924 (R. 24, 151–152). On February 11, 1924, shortly after receipt of this notification, a waiver signed for the Company by Boepple was filed with the Agent extending for one year the statutory period for the 1918 and 1919 taxes (R. 25, 164–165).

Thereafter, in March 1924, a deficiency of $426,209.28 was assessed for the year 1918. A claim for abatement of this tax, signed for the Company by Krueger as vice president, was filed on April 7, 1934 (R. 26, 166). Several weeks later the Agent submitted reports showing deficiencies for the fiscal years ended March 31, 1918 and 1919 in the amounts of $6,914.21 and $84,-681.50, respectively, instead of the $426,209.28 amount assessed for the calendar year 1918, and recommending the assessment of certain deficiences for the fiscal years 1920 and 1921 (R. 486).

On November 10, 1924, following a postponement requested by the Company because of the absence of Krueger "the Trustee now in charge of the Company's affairs" (R. 26, 170), a conference attended by Krueger was held in Washington, D. C., with representatives of the Income Tax Unit to discuss the Company's tax liability for the various years (R. 26–27). Krueger was accompanied by an accountant and by William F. Hoffman (R. 487), a trustee of an estate which was a substantial stockholder of the Company (R. 172). Hoffman had been appointed by the liquidating trustees their attorney in fact "for the purpose of attending at such conferences [as might be held with the Income Tax Unit] in the interest of the Company and its stockholders" (R. 173). At the conference the taxpayer was granted 30 days' additional time in which to establish its

claims for reduction in its taxes "conditional upon waivers being filed for 1918 and 1919" (R. 175–176, 180–181). Two days later a waiver signed for the Company by "Wm. C. Krueger, Liquidating Trustee" and attested by Boepple as assistant secretary was filed with the Commissioner extending for one year the statutory periods for the three months ended March 31, 1918, and for the fiscal years ended March 31, 1919 and 1920 (R. 27, 181–182).

Together with this waiver there was forwarded to the Commissioner a power of attorney of the same date signed for the Company by Krueger and attested by Boepple appointing Edward M. Treanor the Company's attorney to take all necessary or appropriate action with respect to the taxes (R. 27, 182–183). The Deputy Commissioner returned the power of attorney, requesting that it be executed "by the board of directors who under the laws of New Jersey are trustees in liquidation of the dissolved corporation" (R. 28, 200–201). Although counsel for the Company in an opinion had notified the Commissioner that they believed the power was validly executed (R. 196–200), a request to cancel it was made on the ground that company officials attended the original conference of November 10, 1924, and would attend future conferences (R. 201).

Subsequent to the original conference which was attended by Krueger, as aforesaid, the amount of

tax deficiencies was considered from time to time in conferences during 1925 and until June 3, 1926, when the Commissioner finally notified the Company of his proposed determination (R. 486–487). These conferences were attended by Hoffmann, representing the petitioners, and at them various protests and data were submitted in behalf of the taxpayer (R. 486). The district court found that the waivers had not been called to the attention of Hoffmann (R. 488, 489), but that, without complete information as to its accuracy, he ultimately accepted the Government's figure of approximately $129,000 taxes due (R. 487).

Second Count: Under this count the petitioners seek to recover $70,381.79, representing a portion of the same taxes involved under the first count (R. 8–13). The alleged basis for this relief is that the Commissioner allowed insufficient deductions for obsolescence of the Company's breweries. Since the taxes were paid on December 15, 1926 (R. 30–31), the time for filing claims for refund expired December 15, 1930 (Revenue Act of 1926, Sec. 284 (b) (1), Appendix, *infra,* pp. 18–19). Claims for refund asserting the grounds alleged in the First Count were filed on February 6, 1930 (R. 31–32, 301–330), and in 1931 memoranda were filed in support of these claims (R. 331–349). Thereafter, on August 11, 1932, the claims were amended to include the contention that additional deductions should have been allowed for obso-

lescence (R. 32, 350–355). On the ground that this subject matter was not covered by the original claims, the Deputy Commissioner refused to consider the amendments on the merits (R. 361–364). The district court, although not passing upon the Second Count, made a finding that no claims presenting the issue raised by it were filed prior to December 15, 1930 (R. 490). The court below, in denying recovery under the Second Count, ruled that the respective questions covered by the claims for refund as originally filed and by the amendments "could hardly be at more distant poles" (R. 521).

ARGUMENT

First Count

A. In reversing the judgment of the district court and denying any recovery under the First Count, the court below held that Krueger had implied authority to execute the waivers and that under settled principles of agency the other liquidating trustees were bound by them (R. 518–519). This holding was clearly correct in view of the undisputed facts (*supra*, pp. 5, 7) showing that Krueger, with the apparent approval or at least acquiescence of the other trustees, was in active charge of winding up the Company's affairs. The contention that he was not authorized to execute the waivers was first advanced some 5 years after they were entered into and more than 3

years after the taxes were paid. And even now there is no suggestion that he did not act for the benefit of the other trustees and stockholders or that he departed from any instructions.

Under Section 53 of the Corporation Act of New Jersey (L. 1896, c. 185, Appendix, *infra*, p. 22), the corporate existence of dissolved New Jersey corporations continues "for purposes of * * * enabling them to settle and close their affairs * * *," and under statutory provisions similar to those of New Jersey it is well established that waivers executed by a single officer after dissolution are valid where, as here, in view of the officer's position and duties, they would have been binding on the corporation if there had been no dissolution. *Jaffee* v. *Commissioner*, 45 F. (2d) 679 (C. C. A. 2), certiorari denied, 283 U. S. 853; *Commissioner* v. *Angier Corporation*, 50 F. (2d) 887 (C. C. A. 1), certiorari denied, 284 U. S. 673; *Commissioner* v. *Godfrey*, 50 F. (2d) 79 (C. C. A. 2), certiorari denied, 284 U. S. 653; *Helvering* v. *South Penn Oil Co.*, 68 F. (2d) 420 (App. D. C.).[3]

Although the court below accepted local law as controlling (R. 517), the petitioners contend (Pet. 12, 21–30) that its decision is contrary to New Jer-

[3] See also *Continental Oil Co.* v. *United States*, 14 F. Supp. 533 (C. Cls.); *Newark Morning Ledger Co.* v. *Commissioner*, 39 B. T. A. 654; *T. H. Symington & Son, Inc.*, v. *Commissioner*, 35 B. T. A. 711; *Morning Sun Publishing Co.* v. *Commissioner*, 31 B. T. A. 356.

sey law and therefore in conflict with *Erie R. Co.* v. *Tompkins,* 304 U. S. 64; *Oklahoma Natural Gas Co.* v. *Oklahoma,* 273 U. S. 257; *Glenn* v. *Liggett,* 135 U. S. 533. They assert that Sections 31, 54, and 73 of the Corporation Act (Appendix, *infra,* pp. 21–24) and the decision in *In re Delaware R. R. Co.,* 76 N. J. L. 163 (Sup. Ct.), require that the liquidating trustees of a dissolved New Jersey corporation act by a majority or, if through an agent, through one authorized by a majority of the trustees. However, there is nothing in those provisions or in the decision or opinion cited which requires the authorization to be express. In the *Delaware R. R. Co.* case one of the three trustees who executed the proxy appointing Thompson to vote the stock revoked his assent to it and, so far as appears, unlike the situation here, there were no circumstances from which it could have been inferred that Thompson was authorized by either of the two trustees who had not joined in the proxy. Hence that case is inapplicable.

The petitioners contend also (Pet. 13, 30–34) that the decision of the court below is contrary to Rule 52 (a) of the Rules of Civil Procedure and to decisions[4] of several circuit courts of appeals

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[4] *Santa Cruz Oil Corp.* v. *Allbright-Nell Co.*, 115 F. (2d) 604 (C. C. A. 7); *Webb* v. *Frisch*, 111 F. (2d) 887 (C. C. A. 7); *Continental Oil Co.* v. *Jones*, 113 F. (2d) 557 (C. C. A. 10); *Kelly* v. *Aderhold*, 112 F. (2d) 118 (C. C. A. 10); *Wittmayer* v. *United States*, 118 F. (2d) 808 (C. C. A. 9).

interpreting that Rule, which provides that findings of fact shall not be set aside unless clearly erroneous. It is true that the district court found that the other trustees "never authorized" Krueger to execute the waivers (R. 488, 489). But this finding, as indicated by the word "never," means only that there was no express authorization. If it were to be construed to mean in addition that Krueger lacked any implied authority, it would be a conclusion of law and, in any event, clearly erroneous.

B. Whether or not under principles of agency the waivers were authorized, it seems clear that the petitioners should be estopped to deny their validity or to recover the taxes. The facts (*supra,* pp. 6–9) show, in substance, that the petitioners requested the Commissioner to arrive at a full determination of the Company's tax liability for all of the years involved before making or enforcing an assessment for 1918, that they asked and were granted additional time to support their protests, that as a consequence of the protracted consideration given their side, the original assessment of $426,209.28 for 1918 was reduced to $4,885.19 and $38,206.46 for the first three months of 1918 and the year ended March 31, 1919, respectively, and that, apart from their contention under the Second Count, they do not deny that the taxes paid were owing. In these circum-

stances it would be inequitable for them to recover and, under decisions in analogous cases, they are estopped. See *Stearns Co.* v. *United States,* 291 U. S. 54; *Stone* v. *White,* 301 U. S. 532, 537–538; *Union Bleachery* v. *Commissioner,* 97 F. (2d) 226 (C. C. A. 4); *Lucas* v. *Hunt,* 45 F. (2d) 781 (C. C. A. 5); *Wonder Bakeries Co.* v. *United States,* 6 F. Supp. 228 (C. Cls.).

Second Count

In support of this count the petitioners contend (Pet. 34–46) that the facts with respect to the allowances for obsolescence necessarily would have been ascertained by the Commissioner in deciding the merits of the claims for refund filed within the statutory period and that therefore the subsequent amendments to the claims were proper and should have been determined. This contention is untenable. The timely claims for refund raised no question with respect to the allowances for obsolescence, but were limited to the distinct issues as to the validity and effect of the waivers.

The petitioners rely (Pet. 8–10, 38–39) upon the fact that they filed memoranda in support of the timely claims wherein for the purpose of showing that they were not estopped they called the Commissioner's attention to certain circumstances concerning the deductions for obsolescence (R. 340–341). But such fact is immaterial. The Commissioner upheld the waivers and accordingly

had no occasion to, and did not, determine the question of estoppel (R. 358–364). Moreover, even if that question had been decided, there would have been no need to investigate the allowances for obsolescence.

The decision of the court below that the amendments were barred is in accord with *United States* v. *Andrews,* 302 U. S. 517, and *United States* v. *Garbutt Oil Co.,* 302 U. S. 528. In each of the cases [5] cited by the petitioners (Pet. 13–14, 35–39, 40–44) as being in conflict or probable conflict with the decision of the court below, except *United States* v. *Henry Prentiss & Co.,* 288 U. S. 73, reaching a result similar to that herein, the facts were such that the Commissioner's consideration of the timely claims necessarily required him to investigate the subject later included by amendment.

CONCLUSION

The decision below is correct. It turns upon the peculiar facts of the case and does not present a question of general importance. There is

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[5] *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62; *United States* v. *Factos & Finance Co.,* 288 U. S. 89; *Bemis Bros. Bag Co.* v. *United States,* 289 U. S. 28; *Pink* v. *United States,* 105 F. (2d) 183 (C. C. A. 2); *Youngstown Sheet & Tube Co.* v. *United States,* 7 F. Supp. 290 (C. Cls.), certiorari denied, 293 U. S. 599; and in *Con. P. Curran Printing Co.* v. *United States,* 15 F. Supp. 153 (C. Cls.), certiorari denied, 301 U. S. 686, on the same matter.

no conflict of authority. The petition should be denied.

Respectfully submitted,

WARNER W. GARDNER,
Acting Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
J. LOUIS MONARCH,
PAUL R. RUSSELL,
Special Assistants to the Attorney General.
H. G. INGRAHAM,
Attorney.

OCTOBER 1941.

APPENDIX

Revenue Act of 1926, 44 Stat. 9:

SEC. 277. (a) Except as provided in section 278—

* * * * *

(2) The amount of income, excess-profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by the Revenue Act of 1924, shall be assessed within four years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(3) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

[Similar provisions are found in Section 277 (a) (1) and (2) of the Revenue Act of 1924, 43 Stat. 253.]

SEC. 278.

* * * * *

(c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.

* * * * *

SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case

of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

* * * * *

(g) If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid. If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. If the taxpayer has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 or 1921, then such credit or refund relating to the taxes for the taxable year 1920 or 1921 shall be allowed or made if claim therefor is filed either on

or before April 1, 1927, or within four years from the time the tax was paid. If any such waiver so filed has, before the expiration of the period thereof, been extended either by the filing of a new waiver or by the extension of the original waiver, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either (1) within four years from the time the tax was paid, or (2) on or before April 1, 1926, in the case of credits or refunds relating to the taxes for the taxable years 1917 and 1918, or on or before April 1, 1927, in the case of credits or refunds relating to the taxes for the taxable year 1919, or on or before April 1, 1928, in the case of credits or refunds relating to the taxes for the taxable years 1920 and 1921. This subdivision shall not authorize a credit or refund prohibited by the provisions of subdivision (d).

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SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard * * * (U. S. C., Title 26, Sec. 1672).

* * * * *

Corporation Act of New Jersey (L. 1896, c. 185):

> 31.[6] Whenever, in the judgment of the board of directors, it shall be deemed advisable and most for the benefit of such corporation that it should be dissolved, the board, within ten days after the adoption of a resolution to that effect by a majority of the whole board at any meeting called for that purpose, of which meeting every director shall have received at least three days' notice, shall cause notice of the adoption of such resolution to be mailed to each stockholder residing in the United States, and also beginning within said ten days cause a like notice to be published in a newspaper published in the county wherein the corporation shall have its principal office, at least four weeks successively, once a week, next preceding the time appointed for the same, of a meeting of the stockholders to be held at the office of the corporation, to take action upon the resolutions so adopted by the board of directors, which meeting shall be held between the hours of ten o'clock in the forenoon and three o'clock in the afternoon of the day so named, and which meeting may, on the day so appointed, by consent of a majority in interest of the stockholders present, be adjourned from time to time for not less than eight days at any one time, of which adjourned meeting notice by advertisement in said newspaper shall be given; and if at any such meeting two-thirds in interest of

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[6] The provisions of this section, as here quoted, are different from those quoted by the petitioners (Pet. 23, 49–50). The provisions quoted by the petitioners (R. S. 14: 13–1) include the amendments of 1926 (L. 1926, c. 318, Sec. 10, p. 538) and hence are inapplicable herein.

all the stockholders shall consent that a dissolution shall take place and signify their consent in writing, such consent, together with a list of the names and residences of the directors and officers, certified by the president and the secretary or treasurer, shall be filed in the office of the secretary of state, who, upon being satisfied by due proof that the requirements aforesaid have been complied with, shall issue a certificate that such consent has been filed, and the board of directors shall cause such certificate to be published four weeks successively, at least once a week, in a newspaper published in said county; and upon the filing in the office of the secretary of state of an affidavit that said certificate has been so published, the corporation shall be dissolved and the board shall proceed to settle up and adjust its business and affairs; whenever all the stockholders shall consent in writing to a dissolution, no meeting or notice thereof shall be necessary, but on filing said consent in the office of the secretary of state he shall forthwith issue a certificate of dissolution, which shall be published as above provided.

53. All corporations, whether they expire by their own limitation or be annulled by the legislature or otherwise dissolved, shall be continued bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them to settle and close their affairs, to dispose of and convey their property and to divide their capital, but not for the purpose of continuing the business for which they were established.

54. Upon the dissolution in any manner of any corporation, the directors shall be

trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell and convey the property and divide the moneys and other property among the stockholders, after paying its debts, as far as such moneys and property shall enable them. They shall have power to meet and act under the by-laws of the corporation, and, under regulations to be made by a majority of said trustees, to prescribe the terms and conditions of the sale of such property, and may sell all or any part for cash, or partly on credit, or take mortgages and bonds for part of the purchase price for all or any part of said property. In case of a vacancy or vacancies in the board of directors of such corporation existing at the time of dissolution or occurring subsequent thereto, the surviving directors or director shall be the trustees or trustee thereof, as the case may be, with full power to settle the affairs, collect the outstanding debts, sell and convey the property and divide the moneys and other property among the stockholders, after paying its debts, as far as such moneys and property shall enable them, and to do and perform all such other acts as shall be necessary to carry out the provisions of this act relative to the winding up of the affairs of such corporation and to the distribution of its assets. (L. 1896, p. 295, as amended L. 1910, p. 51.)

55. The directors, constituted trustees as aforesaid, shall have authority to sue for and recover the aforesaid debts and property, by the name of the corporation, and shall be suable by the same name, or in their own names or individual capacities, for the debts owing by such corporation, and shall be jointly and severally responsible for such

debts, to the amount of the moneys and property of the corporation which shall come to their hands or possession as such trustees.

73. Every matter and thing by this act required to be done by receivers or trustees shall be good and effectual, to all intents and purposes, if performed by a majority of them; and the court of chancery may remove any receiver or trustee, and appoint another or others in his place or fill any vacancy which may occur.

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